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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 79-1385

CLINTON MANGES AND DUVAL COUNTY RANCH COMPANY, INC.,
Petitioners

v.

SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE,
Respondents

REPLY BRIEF OF RESPONDENTS, SIDNEY SPARKS AND R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents, SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE (hereafter SPARKS-LYND), pray that the Petition of DUVAL

COUNTY RANCH COMPANY, INC. (hereafter DCRC) and CLINTON MANGES (hereafter MANGES), for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit be denied, or if granted, that the en banc decision of the Court of Appeals for the Fifth Circuit be affirmed.

OPINIONS BELOW

The District Court's memorandum order is included in the Appendix to the Petition for writ submitted by ORVILLE E. DENNIS in No. 79-1186 at Page A-1. The panel decision of the Court of Appeals is reported in 588 F2d 124, and the en banc decision from which certiorari is sought is reported in 604 F2d 9.6.

JURISDICTION

Jurisdiction under 28 USC, Sec. 1254(1)

is not available to review the petition for certiorari filed by Petitioners DUVAL COUNTY RANCH COMPANY, INC. and CLINTON MANGES on March 7, 1980 to review the order of the Court of Appeals for the Fifth Circuit in Cause No. 77-12-49, for the reason that 28 USC Sec. 2101(c) requires that such petitions for certiorari be filed "within ninety days after the entry of such judgment or decree", and an excess of ninety days had expired before the petition was filed.

QUESTIONS PRESENTED

May the U. S. Supreme Court grant certiorari on a petition filed with the Clerk of the Supreme Court more than ninety days after entry of the decree of the Court of Appeals sought to be reviewed? If not, does the filing of a motion for rehearing by a party other than petitioner, extend the time for

the non-movant petitioner to the date of denial of the motion for rehearing.

STATUTES INVOLVED

The statute involved is 42 USCS, Section 2101(c), which reads as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

and if timely filed, then 42 USCS, Section 1983 is involved. It reads as follows:

> "Sec. 1983. Civil action for deprivation of rights, Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The decree or judgment of the Court of Appeals, Fifth Circuit, was entered in this case on October 22, 1979. The petition for certiorari on behalf of DUVAL COUNTY RANCH COMPANY, INC. and CLINTON MANGES was not filed until March 7, 1980, some 136 days after the decree was entered. However, another defendant, ORVILLE E. DENNIS, timely filed a motion for rehearing, which was denied on December 14, 1979. If petitioner's time to file does not begin to toll until the latter date, then the March 7, 1980 filing is within the ninety days.

MANGES and DCRC participated below only through surrogates, having by letter of May 9, 1977 from their counsel chosen "to

adopt the briefs heretofore filed in behalf of O. P. Carrillo and Orville E. Dennis," and as to the en banc hearing, acting for DUVAL COUNTY RANCH COMPANY, INC. only, their counsel asked that it "be permitted to adopt the brief filed herein, filed by Appellees in the instant cause," and further that it "would not request any time for oral argument but instead would adopt the oral argument of Appellees herein." Neither petitioner participated in oral argument or filed briefs in the Court of Appeals.[1.]

The failure of petitioners to participate until the case reached the Supreme Court, or the late filing should dispose of

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1. Copies of such letters and the Clerk's reply are lodged with the Clerk for information of the Court, and copies are also served on other counsel and parties with copies of this Reply.

the petition. If not, we adopt briefs filed in 79-1186 and 79-1239 as answer on the merits. Petitioner's "Statement of the Case" (p. 3-6) says Respondents' complain of the granting of a wrongful injunction by the State Judge. At best, this is only a half truth. The crux of the complaint is that the wrongful injunction was induced by a bribe given by CLINTON MANGES, sole owner of DUVAL COUNTY RANCH COMPANY, INC., to the judge in exchange for the agreement of the judge to give up his judicial independence and subordinate his judicial mind to the corrupt will of Petitioners, which resulted, among other things, in the wrongful injunction. That the Court must accept as true the allegations of bribery, as pled, is a correct statement of the law, but falls short in stating the facts. The bribery was proved in proceedings

to disqualify the judge in a state court of competent jurisdiction and is res judicata as to petitioners. This takes from the case all speculation concerning the fact of bribery.

ARGUMENTS AND AUTHORITIES

DCRC and MANGES adopt as their argument that presented in ORVILLE E. DENNIS' petition for Writ of Certiorari filed in 79-1186, which Respondents answered. To the extent pertinent, SPARKS-LYND here adopt their Reply in said 79-1186.

This petition should be denied because of the failure of DCRC and MANGES to participate below, or because it was not filed "within ninety days after the entry of such judgment or decree" (28 USCS, Sec. 2101[c]). However, if the time for filing is suspended by the motion for rehearing filed by another party, ORVILLE E. DENNIS, until such motion

was denied on December 14, 1979, then the filing is within ninety days of denial of rehearing. Gypsy Oil Co. v. Escoe, 275 U.S. 498, 48 S.Ct. 112, 72 L.Ed. 393. If the date of entry of the final judgment controls (October 22, 1979), the petition is not timely filed, and the Court is without jurisdiction. Julia Boylan, et al v. United States of America, 66 L.Ed. 397.

We have been unable to find a case holding that under 28 USCS, Sec. 2101(c) a motion for rehearing by one litigant suspends running of time as to all. In SPARKS-LYND'S petition for certiorari in 79-1239, they construed 28 USCS Sec. 2101(c) as permitting them, as the opposing party, to file within ninety days after denial of the DENNIS motion for rehearing. Such construction would not

necessarily follow as to a party who did not join in the motion, and against whom it was not directed, such as DCRC and MANGES here. The Court, however, denied the petition in 79-1239. We are not certain whether it was denied for late filing, or on the merits. We felt strongly that, on the merits, it should have been granted.

In construing 28 USCS, Sec. 2101(b), the Supreme Court held timely a petition filed more than the alloted time after judgment, but within such time after denial of Appelle's motion to reconsider certain aspects of its judgment. Communist Party of Indiana v. Edgar D. Whitcomb, etc., et al (1974) 414 U.S. 441, 38 L.Ed. 2d 635, 94 S.Ct. 656. The same logic would seem to apply to civil cases under Section 2101(c), and to all parties, whether or not they join in the making or

opposing motions for rehearing, reconsideration, etc., but we do not find a clear cut ruling to this effect.

The motion for rehearing continues jurisdiction in the Court of Appeals, and includes the option in said Court to change its judgment or decree. NLRB v. McKay Radio & Tel. Co. (1938) 304 U.S. 333, 82 L.Ed. 1381, 58 S.Ct. 904. Such a change could render moot appeals prematurely commenced, and change the position of all parties with respect to appeal. Any other construction, results in general confusion and judicial inefficiency by fragmenting the case into separate appeals of its many parts and parties, as here, where we have three appeals (79-1186, 79-1239 and 79-1385) all involving the same cause of action below.

SUMMARY

Having assumed in Cause 79-1239 that the motion for rehearing filed by DENNIS (in 79-1186) suspended the tolling of time for SPARKS-LYND to file certiorari until December 14, 1979, we cannot consistently urge a contrary position as to petitioners in 79-1385. However, if we were wrong, and the petition in 79-1239 was denied as not timely filed (which was urged by DENNIS), then the petition in 79-1385 should likewise be denied as not timely filed.

CONCLUSION

For reasons set forth above, respondents SIDNEY SPARKS and R. L. LYND d/b/a SIDNEY SPARKS, TRUSTEE, pray that the petition for writ of certiorari filed hereby in DUVAL COUNTY RANCH COMPANY, INC. and CLINTON MANGES be denied; or if granted, that it be consoli-

dated with 79-1186 and the two heard together and that on final hearing the en banc decision of the Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the parties or their counsel of record as indicated below, on this 8th day of May, 1980.

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